No. 92-780

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,

Petitioners,

vs.

JOSEPH SCHEIDLER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK, CONNECTICUT, ILLINOIS, MINNESOTA, NORTH CAROLINA, OHIO AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

Amici are states where health care facilities have been targets of blockades and other conspiratorial activity by Operation Rescue, its local affiliates and other antiabortion extremists. *Amici* respectfully submit this brief in support of petitioner National Organization for Women and other petitioners.

The activities of Operation Rescue, similar organizations and persons who share their methods are intended to interfere and have interfered with the ability of state and local law enforcement authorities to maintain law and order. Those activities have

also interfered with women and men seeking reproductive health care. Operation Rescue's activities have severely strained the law enforcement and judicial resources of the affected states.

As states, *amici* have a strong interest in ensuring that civil peace is maintained and in protecting the right of citizens to engage in lawful protest activities. Because of the unlawful activities like those respondents are alleged to have engaged in, other citizens have been deprived of lawful reproductive health care, including abortion services. *Amici* have an interest in securing and maintaining the confidence of their citizens that once abortion services have been made available, those who limit access to such services by unlawful activity will be subject to the full force of all available legal remedies, state and federal.

Amici have, as well, a strong interest in ensuring that their citizens are empowered by federal law to combat the unlawful and injurious activities of which respondents are accused. Operation Rescue is engaged in a conspiracy that is national in scope; its *modus operandi* is to overwhelm state and local law enforcement resources. Civil actions and criminal prosecutions brought under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, address the national scope of violence against abortion providers and support the efforts of state and local governments to maintain peace and order. *Amici* submit that compelling reasons exist for securing this meaningful federal remedy in the arsenal of remedies available to curtail and redress the extortionate activities at issue in this case.

SUMMARY OF ARGUMENT

Violence against providers of abortion services is widespread and beyond any single state's or locality's law enforcement capabilities to redress. Opposition to abortion by Operation Rescue and those who share its methods has taken a violent direction and is intended to overrun local police forces and reproductive health providers. Remedies available in the district courts can address the nationwide scope of antiabortion violence.

The plain text of RICO prohibits the pattern of racketeering activity alleged in the complaint in this case. Nowhere in that text is there any positive sign that Congress intended RICO to reach only enterprises or their criminal predicate acts that have a financial purpose or an economic motivation. Rather, section 1962(c) makes it unlawful to conduct or participate in the conduct of an enterprise's affairs through a pattern of racketeering activity, a prohibition which surely addresses the lawless acts defendants are alleged to have carried out. Moreover, the legislative history is not in conflict with the plain text of the statute; indeed, that history demonstrates that Congress did not intend to restrict the reach of RICO to enterprises or crimes with an economic motivation. The economic purpose requirement engrafted onto RICO by the lower court produces confusing and unpredictable results.

RICO can be invoked against violent antiabortion protesters without trammelling precious First Amendment rights. The threat of such prosecutions does not impermissibly chill lawful expression or association.

ARGUMENT

I. VIOLENCE AGAINST PROVIDERS OF ABORTION SERVICES PRESENTS A PROBLEM OF NATIONAL SCOPE REQUIRING A FEDERAL REMEDY

Blockades of health care clinics and other disruptive, health-threatening activities by Operation Rescue and similar organizations and individuals, such as bombings, arson and vandalism of clinics, and assaults, threats of violence, and harassment and intimidation of patients and staff, present a problem of national dimension. The magnitude of these activities is beyond the capability of any one state's laws or law enforcement authorities effectively to redress.

The geographical range of the numerous cases brought against Operation Rescue, local affiliates and other extremeists illustrates

the high and sustained level of nationwide activity.[1] While many of the cases have sought civil remedies against the antiabortion extremists, orders or judgments entered in them have frequently been disobeyed, leading to contempt proceedings both civil[2] and criminal[3] in nature.

The coordinated nature of the conduct is evident in the similarity with which harassment and violence, including arson, bombing, assaults and batteries, and clinic invasions, occur

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[1] *E. g., Bray v. Alexandria Women's Health Clinic*, U.S. , 113 S. Ct. 753 (1993)(Virginia); *Pro-Choice Network of Western New York v. Walker*, 994 F.2d 989 (2d Cir. 1993)(Buffalo, N.Y.); *Town of West Hartford v. Operation Rescue*, 991 F.2d 1039 (2d Cir. 1993)(Connecticut); *New York State N.O.W. v. Terry*, 886 F. 2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 948 (1990)(New York City); *Lucero v. Operation Rescue of Birmingham*, 954 F.2d 624 (11th Cir. 1992)(Alabama); *Aradia Women's Health Center v. Operation Rescue*, 929 F.2d 530 (9th Cir. 1991)(Washington State); *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218 (6th Cir. 1991)(Ohio); *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 110 S.Ct. 261(1989)(Pennsylvania); *Portland Feminist Women's Medical Center v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988)(Oregon); *Pro-Choice Network v. Project Rescue*, 799 F. Supp. 1417 (W.D.N.Y. 1992)(Buffalo, N.Y.); *Women's Health Care Services v. Operation Rescue*, 773 F. Supp. 258 (D. Kan. 1991), *app. pending*, No. 91-3250 (10th Cir.)(Kansas); *Planned Parenthood Association of San Mateo County v. Holy Angels Catholic Church*, 765 F. Supp. 617 (N.D. Cal. 1991)(California); *Town of Brookline v. Operation Rescue*, 762 F. Supp. 1521 (D. Mass. 1991)(Massachusetts); *Southwestern Medical Clinics of Nevada v. Operation Rescue*, 744 F. Supp. 230 (D. Nev. 1989)(Nevada); *NOW v. Operation Rescue*, 726 F. Supp. 300 (D.D.C. 1989)(District of Columbia); *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168 (C.D. Cal. 1989)(California); *Bering v. Share*, 721 P.2d 918 (Wash. 1986)(Washington State); *People of the State of New York v. Operation Rescue National, et al.*, No. 92 Civ. 4884 (S.D.N.Y.)(New York City); *State of Wisconsin and City of Milwaukee v. Missionaries to the Preborn et al.*, No. 92 CV 008-195 (Wisc. Cir. Ct)(Wisconsin).

[2] *Pro-Choice Network of Western New York v. Walker*, 994 F. 2d at 989; *Aradia Women's Health Center v. Operation Rescue*, 929 F. 2d at 534; *Women's Health Care Services v. Operation Rescue National*, 1991 WL 228341 (D. Kan., Oct. 9, 1991); *People of the State of New York v. Operation Rescue National*, No. 92 Civ. 4884(RJW)(S.D.N.Y., Aug. 5, 1992).

[3] *United States v. Terry*, 815 F. Supp. 728 (S.D.N.Y. 1993); *In re Slovenec*, 799 F. Supp. 1441 (W.D.N.Y. 1992).

throughout the nation.[4] Those tactics have been documented to include:

> [I]nvading clinics, blocking entrances and parking lots, making phone calls to clinics and to employees' homes which threaten death to employees and threaten bombing of the clinics; photographing and filming patients and employees; copying down and tracing license plates of patients and making harassing phone calls to them at home; banging on doors and windows while surgery is in progress; flinging fetuses in the faces of patients trying to enter; and setting up gauntlets through which patients must pass.[5]

It is not merely the similarity of the conduct, however, that illustrates the coordination of the nationwide activities. In fact, antiabortion leaders have met to discuss the lawless tactics for their opposition and have issued guidebooks and plans for carrying them out.[6] For example, in April 1984, eighty or more antiabortion leaders from thirty states gathered in Appleton, Wisconsin and announced, under the organizational banner of the "Pro-Life Action Network," a " 'Year of Pain and Fear' for

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[4] The National Abortion Federation has tabulated incidents of violence against abortion providers between 1977 and April 1993. *See Testimony of Willa Craig Before the Committee on Labor and Human Resources*, United States Senate (May 12, 1993), Table. It reports that there have been 1,295 incidents of violence (including murder, bombing, arson, attempted bombing, attempted arson, invasion, vandalism, assault and battery, death threats, kidnaping, burglary and stalking); 5563 incidents of disruption (hate mail and harassing calls, bomb threats, picketing); and 563 clinic blockades resulting in 32,953 arrests.

[5] Oversight Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 99th Cong., 1st & 2d Sess. [hereinafter "*Abortion Clinic Violence*"], at 174(Testimony of Prof. Rhonda Copelon); *see also* Note, *Using Civil RICO to Battle Anti-Abortion Violence: Is the Last Weapon in the Arsenal a Sword of Damocles?* [hereinafter "*Using Civil Rico*"], 25 New Eng. L. Rev. 1363, 1388-89 (1991).

[6] *E.g.* Scheidler, *Closed: 99 Ways to Close Abortion Clinics* (1985); Terry, *Operation Rescue* (1988).

anyone receiving or performing an abortion."[7] Following that call to action, in 1985, 88% of nonhospital facilities performing three-fourths of abortions in the United States reported "some type of harassment," including 48% reporting bomb threats and 47% reporting that patients had been physically blocked from entering the clinics.[8]

In the summer of 1991, Operation Rescue issued a national call targeting two clinics in Wichita, Kansas for blockades. Large numbers of extremists converged on Wichita, closing the clinics for a week until federal marshals, enforcing an injunction entered by the district court, restored order. The district court observed that "[b]y targeting Wichita as the focus of its national efforts, Operation Rescue has virtually overwhelmed the resources of the city's relatively small police forces to respond with dispatch and effectiveness." *Women's Health Care Services v. Operation Rescue*, 773 F. Supp. at 265. The events in Wichita resulted in more than 2700 arrests.[9]

In 1992, the pace of these lawless activities accelerated. In April, antiabortion leaders organized mass blockades of clinics in Buffalo, New York, which resulted in 605 arrests.[10] In June, blockades comprised largely of the children of antiabortion protesters began in Milwaukee, lasting more than ten months and resulting in more than 2,000 arrests, over four hundred of which involved juveniles.[11] Anti-abortion leaders made a national call

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[7] *Abortion Clinic Violence*, *supra* n. 5 at 617 (Letter of Faye Wattleton, President Planned Parenthood Federation of America, to Atty. Gen. Edwin Meese, III, May 16, 1985).

[8] Note, *The Use of Civil RICO Against Antiabortion Protestors and the Economic Motive Requirement*, 90 Colum. L. Rev. 1341, 1342 (1990).

[9] Testimony of Willa Craig, *supra* n.4, Table.

[10] *Id.* The State of New York brought suit against Operation Rescue and its leaders, including Randall Terry, a respondent in this matter, joining private litigants in the effort to preserve access to clinics in Buffalo and surrounding municipalities. *People of the State of New York v. Operation Rescue National, et al.*, 92-CV-0147A (W.D.N.Y.).

[11] *Testimony of Willa Craig*, *supra* n.4, Table.

for blockades in New York City during July to coincide with the Democratic National Convention scheduled to occur there.[12] Similar calls for blockades in Baton Rouge, Louisiana during July and Houston, Texas during the Republican National Convention in August led to further mass arrests.[13]

Similarly, in July 1993, Operation Rescue and other antiabortion extremists targeted clinics and providers in seven cities across the United States – Minneapolis, Philadelphia, Melbourne (Florida), Jackson (Mississippi), Cleveland, San Jose and Dallas/Ft. Worth – for "direct action." Coined the "Cities of Refuge," the plan called for blockades of clinics and harassment

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[12] Again, the State of New York sued Operation Rescue National and its leaders. *People of the State of New York v. Operation Rescue National, et al.*, 92 Civ. 4884 (RJW)(S.D.N.Y.). On July 13, 1992, the district court issued a preliminary injunction enjoining blockades and other activities. On July 14, under the guidance of Bi-State Operation Rescue Network (B.O.R.N.), a local affiliate, four antiabortion protesters made phony appointments for medical services at a clinic, and, upon entering the office, locked themselves into an examining room and destroyed an aspirator, causing hundreds of dollars in damages. B.O.R.N. and the vandals were held in civil contempt and fined a total of $100,000. *Id.* (Judgment, dated August 5, 1992). A violation of the preliminary injunction by Randall Terry resulted in his conviction under 18 U.S.C. § 401(3), *see United States v. Terry*, 815 F. Supp. at 737, and sentencing to five months imprisonment.

[13] The litigation experience of the State of New York demonstrates the nationwide scope of respondents' activities. The suits brought in Buffalo and New York City named as defendants antiabortion leaders from Georgia, Virginia, New York, South Carolina and elsewhere. One of the defendants, Joseph Foreman, had been leading children *en masse* to blockade clinics in Milwaukee when he arrived in New York. Another, a South Carolina resident, was organizing blockades in Baton Rouge while calling for blockades in New York City. Several weeks after the district court directed the arrest of five contemnors in the New York City litigation, two of them, Randall Terry, a New Yorker, and Patrick Mahoney, a Virginia resident, were held on contempt charges in Houston. When the criminal contempt trial of Randall Terry was about to begin in New York City, one of his witnesses, Jeff White, a leader of Operation Rescue-California, had to be transported by federal marshals to Manhattan from jail in Western New York, where he was incarcerated for criminal contempt of an injunction of the District Court for the Western District of New York. *See United States v. Terry*, 806 F. Supp. 490 (S.D.N.Y. 1992); *In re Slovenec*, 799 F. Supp. 1441 (W.D.N.Y. 1992).

of physicians and other health personnel at their homes and in their communities.[14]

The cost of that lawlessness is daunting, and serves the perpetrators' extortionate objectives. For example, the National Abortion Federation has reported that the cost of police and other municipal responses in Wichita was $1,000,000, more than $1.5 million in Milwaukee and almost $400,000 in Buffalo.[15] Those costs do not include the expenses of clinics or organizations responding to the blockades. The Federation reports the damage caused by arson and bombing incidents at clinics during 1992 at nearly $2.4 million.[16] Seventy-one known incidents of noxious chemical vandalism during 1992, such as the spreading of butyric acid in clinics' ventilation systems, resulted in at least $545,050 in damage.[17] The Federation does not include in those estimates the expenses of increased insurance premiums or security systems and personnel that providers have incurred.

There is no tally of the cost in human suffering to the patients who are harassed at clinics or to the health care professionals who are subjected to threats of violence and intimidation at their homes and in their communities. It is apparent, however, that the antiabortion leaders do not respect the safety of patients. As one provider testified before Congress:

> Anti-abortion protestors have shown little or no regard for the physical and emotional well-being of people entering and leaving reproductive health care facilities. . . Studies

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[14] In connection with the "Cities of Refuge" plan, Operation Rescue leaders issued letters describing the activities. Those letters explained that the project had been in preparation for more than a year, and included the convening of two "Impact Team" training sites, one in Melbourne, Florida, and the other near Minneapolis, which served as "boot camps" for those who would engage in clinic takeovers and other lawless action. *See* Letter of Keith Tucci, Executive Director, Operation Rescue-National, dated April 4, 1993, and Letter of Randall Terry, Founder, Operation Rescue, dated April 4, 1993. Those letters, as is typical, also solicited monetary contributions to support both the Impact Team training and "direct action" against clinics during the Cities of Refuge.

[15] *Testimony of Willa Craig, supra* n. 4, Table.

[16] *Id.*

[17] *Id.*

have shown an increased rate of complications at abortion facilities where demonstrations take place.

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While I respect the right to peacefully demonstrate, I cannot tolerate the constant abuse and harassment patients are subjected to, often including physical as well as emotional assault, screaming, name-calling and threats to their well-being. Patients have reported that their license plates have been traced and they have been harassed. They have received phone calls in the middle of the night . . .

[At "right to life" seminars] it has been recommended that anti-abortion people dress up as medical staff and stand outside the abortion facility, stop patients on their way in, offer them coffee or soda and donuts. . . [O]nce they have had something to eat, the abortion cannot be safely performed because of the risk of vomiting inherent in the administration of anesthesia to someone who has eaten. If the patient realizes that she has been tricked by the anti-abortion zealots, she may, without realizing the risk to her own health, lie to the medical staff and not tell them she has eaten anything. She may endanger her well-being because she wants the abortion to be performed that day . . . .[18]

Intimidation of abortion providers has resulted in a national decline in the number of physicians willing and able to provide service.[19] According to one respected source, the number of

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[18] *Abortion Clinic Violence*, *supra* n. 5, at 573-75 (Testimony of Bill Baird); *see also id.* at 5-7 (Testimony of Mary Bannecker, Administrator, Northeast Women's Center, Philadelphia, PA); *id.* at 11-12 (Testimony of Heather C. Green, Director of Community Education, Hillcrest Clinic, Norfolk, VA); *id.* at 20-22 (Testimony of Katherine Taylor, Portland, OR); *id.* at 26-33 (Testimony of Beverly Whipple, Executive Director, Feminist Women's Health Center, Yakima, WA); *id.* at 36-37 (Testimony of Joan Babbott, M.D., Executive Director, Planned Parenthood of Connecticut).

[19] Antiabortion leaders have expressed little concern, much less remorse, for the slaying of Dr. David Gunn, an abortion provider in Pensacola, Florida, whose facility was targeted by Operation Rescue. Following the murder, respondent

(Footnote continued)

physician providers declined in thirty-four states between 1985 and 1988.[20]

Operation Rescue and other antiabortion leaders are committed to breaking the law, and have elevated lawlessness to a

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Scheidler stated: "I have to admit that some good came out of it; Doctors are going to be more difficult to get." *Chicago Tribune*, March 12, 1993, p. 1. At about the time of the slaying, Randall Terry stated: "We've found the weak link is the doctor. We're going to expose them. We're going to humiliate them." English, "Anti-Abortion Extremists Taking Civil Disobedience Down Uncivilized Road," *Sun Sentinel* (Fort Lauderdale, FL) March 19, 1993, p. 15A. Several weeks later, in the April 4, 1993 mass mailing he sent soliciting participation in the so-called "Cities of Refuge" scheme, Terry promised Operation Rescue adherents that "more abortionists will be exposed and confronted."

[20] Testimony of Pablo Rodriguez, M.D., Medical Director, Planned Parenthood of Rhode Island before the Committee on Labor and Human Resources, United States Senate (May 12, 1993) at 6, citing Alan Guttmacher Institute, *Abortion Fact Book* (1992). Dr. Rodriguez testified graphically to the harassment he has experienced during a recently launched campaign against providers called "No Place to Hide":

> In the beginning, the harassment was the usual nasty letter and graphic pictures of dismembered fetuses; but slowly it became more aggressive. I began receiving strange packages with dolls inside, as well as subscriptions to gun magazines and hunting lodges, showing pictures of dead animals hanging by their extremities. The "Wanted Posters" began to appear; the first one taped to the front door of the clinic for patients to see. Copies of this hideous poster were also sent to my wife at home and to my office. Then the doors and locks to our clinic were glued on multiple occasions culminating with three episodes of forceful blockading of our clinic. During one of the invasions, the police failed to arrest anyone and when arrests were finally made, the fines were minimal and there were no jail sentences given. The day Dr. Gunn was shot, I knew that my life would irrevocably change.
>
> One week after his death, as I was driving my mother to the bus station, I realized that my car was steering poorly. . . I examined my tires and found that there were 45 nails deeply embedded in them . . . . The following week I received a bill for an insurance policy on my wife's life. I contacted the insurance company who merely stated that somebody filled a fraudulent application . . . . Most recently, I received an I.D. card for a catastrophic health and dismemberment policy . . . . All of this courtesy of those who call themselves "pro-life."

Id. at 3-4.

political, indeed, religious principle. Randall Terry has written that when the law conflicts with *his values*, "the law must give way." Terry, *Operation Rescue* at 124-25. He exhorts his followers to engage in mass disregard of the law so that law enforcement and judicial resources will be overtaxed and fail.[21] And he urges disrespect for and disobedience to judicial orders and officers.[22] Respondent Scheidler has written that his cause "cannot wait for the legislative and judicial process that will make abortion illegal. The activist has to save lives now." Scheidler, *Closed: 99 Ways to Stop Abortion* at 17. Similarly, he testified before Congress that blockades and vandalism are justified by a "higher law" and refused to condemn arson, bombings and other acts of violence.[23]

In view of the nationwide scope of antiabortion lawlessness, and the tactic of overwhelming local law enforcement, the Attorney General of the United States has concluded that the problem caused by Operation Rescue and like groups "transcends the ability of any single local jurisdiction to address it."[24]

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[21] *See* Terry, *To Rescue the Children* 49 (1986)("You should check how overloaded the city's jails and court systems are. In many, many cities, the courts and jails are too overloaded to deal with rescue missions.")

[22] *See* Terry, Letter in Operation Rescue Pamphlet quoted in Note, *Judicial Ineffectiveness: The Inability to Curtail Unlawful Right to Life Protest Activity*, 35 N.Y.L.S. L. Rev. 447, 450 n.55 (1990)("If a judge bows to the pressure of pro-abortion forces, he must know [that] . . . [t]hese cases will take up precious time on an already overcrowded docket . . . . He will look foolish to the public for issuing an order because rescuers won't obey."); Terry, Letter of April 2, 1990("If a judge sentences rescuers to . . . jail, and catches flak from the community, it will cause him to think twice about his injustice and he will probably back off . . . If he doesn't respond, then work to get him recused from cases, or removed from office. Give him no rest.")

[23] *Abortion Clinic Violence*, *supra* n. 5, at 60-76.

[24] Testimony of Janet Reno, Attorney General, Before the Committee on Labor and Human Resources, United States Senate (May 12, 1993) at 4. *See also* Remarks of David R. Lasso, City Manager and Former City Attorney, Falls Church, Virginia, Before the Committee on Labor and Human Resources, United States Senate (May 12, 1993) at 5("It was not until the federal district court in the *Bray* litigation issued an injunction against Operation Rescue that the blockades of the clinics in Falls Church stopped. Federal intervention made all the difference in ending the massive blockades.").

Actions under RICO brought by persons or entities injured by antiabortion lawlessness amounting to extortion are one proper weapon in the arsenal to ensure that political opinion is lawfully expressed. As the statute plainly addresses such lawlessness by enterprises, whether or not they are motivated by economics, this Court should reverse the judgment of the Court of Appeals holding that the allegations of respondents' lawlessness do not state a claim for relief.

II. RICO PROVIDES A REMEDY FOR THE EXTORTIONATE ACTS OF ANTIABORTION PROTESTORS

Petitioners brought this action pursuant to 18 U.S.C. § 1964(c)[25], which provides a civil remedy to any person injured by reason of a pattern of racketeering activities prohibited by section 1962. The complaint, which detailed the extensive criminal activities of defendants' enterprise, alleged, *inter alia*, violations of 18 U.S.C. § 1962(c). While expressing no doubt that the complaint adequately alleged that defendants had committed predicate acts which constitute racketeering activity under RICO, the Court of Appeals, following Second Circuit doctrine[26], affirmed the district court's dismissal of the complaint on the ground that plaintiffs did not allege that defendants' enterprise or the crimes it committed had an economic motivation. *National Organization for Women v. Scheidler*, 968 F.2d 612, 625-30 (7th Cir. 1992).

In requiring that an enterprise or its criminal activities that are otherwise prohibited by section 1962(c) must be shown to have had an "economic motivation," the Court of Appeals for

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[25] Section 1964(c) provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c).

[26] *See United States v. Ferguson*, 758 F.2d 843 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985); *United States v. Bagaric*, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983); *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983).

the Seventh Circuit engrafted onto the statute an element that appears nowhere in its words or history. As this Court observed in an analogous context, "If Congress had intended the . . . circumscribed approach espoused by the Court of Appeals, there would have been some positive sign that the law was not to reach" criminal activities that fall within the language of the statute. *United States v. Turkette*, 452 U.S. 574, 593 (1981)(rejecting contention that RICO does not reach illegitimate businesses). Scrutiny of the language and structure of RICO and a review of the legislative history reveals that Congress did not intend to require that that an enterprise or its predicate criminal acts have an economic motivation.

A. The Plain Text of the Statute Does Not Contain an Economic Motivation Requirement

This Court has repeatedly observed that "[i]n determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' " *United States v. Turkette*, 452 U.S. at 580 quoting *Consumer Product Safety Comm'n v. GTE Sylvania Inc.*, 447 U.S. 102, 108 (1980). *See also Reves v. Ernst & Young*, __ U.S. __, __, 113 S.Ct. 1163, 1169 (1993); *Russello v. United States*, 464 U.S. 16, 20 (1983). Moreover, when this Court is called upon to discern Congress's intent in enacting the RICO statute, it is faced with a "text, in which Congress followed a 'pattern [of] utilizing terms and concepts of breadth.' " *H.J. Inc. v. Northwestern Bell Telephone Company*, 492 U.S. 229, 237 (1989) quoting *Russello v. United States*, 464 U.S. at 21. Indeed, Congress has directed that RICO "be liberally construed to effectuate its remedial purposes." Publ. L. 91-452, § 904(a), 84 Stat. 947, note following 18 U.S.C. § 1961. *See H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. at 249 (emphasizing that RICO is not to have a "pinched construction"); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985)("*Sedima*")(noting RICO's "self-consciously expansive language and overall approach"). "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime. . . . [I]t is in this spirit that all of the Act's provisions should be read." *Id.*, 473 U.S. at 498.

Since its passage, this Court has applied these principles in rejecting efforts by parties to engraft limitations on RICO not apparent in its text. *United States v. Turkette*, 452 U.S. at 580, rejected the argument that "RICO does not make criminal the participation in an association which performs only illegal acts and which has not infiltrated a legitimate enterprise." *Russello v. United States*, 464 U.S. at 20, rejected the contention that the forfeiture provision of section 1963(a)(1) reaches only "interests in an enterprise," not all proceeds acquired or maintained in violation of section 1962, as the statute states. And in *Sedima*, this Court rejected the limitations imposed by the Court of Appeals that a RICO "civil action can proceed only after a criminal conviction," 473 U.S. at 488, and that the statute redresses only a "racketeering injury." *Id.* at 493-500. This Court should reject the "economic motivation" limitation imposed by the Seventh Circuit, as well.

The language of RICO "gives no obvious indication," *id.*, 473 U.S. at 488, that a civil action can proceed only against an economically motivated enterprise. Section 1962(c), under which this action was brought, states:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). That section does not mention "economic motive."

Similarly, section 1961(4), which describes the term "enterprise," contains no indication that an enterprise covered by the act must have an economic motivation. It states that:

> "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

18 U.S.C. § 1961(4). As this Court observed in *United States v. Turkette*, 452 U.S. at 580, "[t]here is no restriction embraced by the definition: an enterprise includes any union or group of individuals associated in fact." In the absence of any express indication in the language of the statute that "enterprise" is limited to entities with a financial purpose, one must assume that "the legislative purpose is expressed by the ordinary meaning of the words used." *Russello v. United States*, 464 U.S. at 21. It is apparent that the ordinary meaning of "enterprise" includes associations that have no economic motivation as well as those that do.[27] Just as the definition "no more excludes criminal enterprises than it does legitimate ones," *id.* at 580-81, it no more excludes enterprises motivated by non-monetary objectives than it does those with economic motivations. Had Congress intended to reach only criminal associations motivated by economics, "it could easily have narrowed the sweep of the definition by inserting a single word . . . ," business, before "enterprise." *See United States v. Turkette*, 452 U.S. at 581.

Nor can any hint that Congress required an enterprise or its criminal conduct to be motivated by economics be found in the statute's list of predicate offenses which define "racketeering activity." *See* 18 U.S.C. § 1961(1) (defining "racketeering activity" to mean certain felonies, including potentially non-economically motivated crimes such as murder, arson, obstruction of justice and witness tampering). The only concern about economic activity expressed by Congress in the language of the statute is in the limitation that an enterprise subject to its terms be "engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(a)-(c). There is no dispute that the activities of the enterprise sued here affect interstate commerce.

Nothing in the structure of section 1962 demands the economic motivation requirement. Both the Seventh Circuit and the Second Circuit have deduced that the use of the term "enterprise"

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[27] The dictionary definition of "enterprise" includes "a project or undertaking that is esp. difficult, complicated or risky" and "a systematic purposeful activity." *Webster's New Collegiate Dictionary* 377 (1980).

in subdivisions (a)[28] and (b)[29] of section 1962 requires that the use of that term in subdivision (c) "refer[] to 'an organized profit-seeking venture.' " *National Organization for Women v. Scheidler*, 968 F.2d at 627 quoting *United States v. Ivic*, 700 F.2d at 60. That conclusion is erroneous.

In *Ivic*, the Second Circuit noted that subdivision (a) makes it unlawful to use funds derived from a pattern of racketeering to acquire an interest in or establish an enterprise engaged in or affecting interstate commerce and that subdivision (b) makes it unlawful to acquire or maintain an interest in or control an enterprise through a pattern of racketeering activity. It concluded that the evil Congress sought to address in those provisions was the investment of funds acquired through racketeering in an enterprise, or the acquisition through racketeering of an interest in an enterprise. It therefore concluded that both provisions contemplate "the sort of entity in which funds can be invested and a property interest of some sort acquired. . . ." *Id.* From those conclusions, the *Ivic* court was led to two further conclusions: first, that an enterprise is "the sort of entity which one joins to make money . . . an organized profit-seeking venture," and, second, that "enterprise" means the same in subdivision (c) as in the other sections and, therefore, subdivision (c) prohibits only those activities leading to investment in or an acquisition of an

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[28] Section 1962(a) provides, in pertinent part:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(a).

[29] Section 1962(b) provides:

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(b).

interest in an enterprise. *Id.* There are several flaws in the *Ivic* court's analysis.

First, it overlooks the language of section 1962(a) and (b). Section 1962(a) not only makes it unlawful to use the proceeds of racketeering to acquire an interest in an enterprise, but also to use those proceeds for the "establishment or operation of" an enterprise. Section 1962(b) not only makes it unlawful to acquire through racketeering activity an interest in an enterprise, but also to "acquire or maintain . . . control" of an enterprise through racketeering activity. An enterprise can be "operated" or "controlled" within the meaning of section 1962(a) and (b) even if funds cannot be invested in it or a property interest acquired from it. In fact, this Court has recognized that the term "enterprise" includes "illegitimate" associations in fact, *United States v. Turkette*, 452 U.S. at 580, in which formal investments cannot be made.

Second, even if it were true that sections 1962(a) and (b) contemplate only enterprises in which investments can be made or from which property can be acquired, neither section suggests that the enterprise must be "profit-seeking." Section 1962(a) prohibits the investment of racketeering-generated income to establish or operate an enterprise. It is plain that not-for-profit organizations, like for-profit entities, require funds for start-up and operation and that income produced through racketeering can meet those needs. Similarly, section 1962(b) prohibits the acquisition of an interest in an entity through racketeering activities; nothing in the statute limits "interest" to a property interest, much less to one in a profit-seeking venture. Courts regularly apply RICO to enterprises that are not profit-seeking.[30]

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[30] *United States v. Hocking*, 860 F.2d 769, 778 (7th Cir. 1988)(state Department of Transportation); *United States v. De Peri*, 778 F.2d 963, 974 (3d Cir. 1985)(police department), *cert. denied*, 475 U.S. 1110 (1986); *United States v. Qaoud*, 777 F.2d 1105, 1116 (6th Cir. 1985)(court), *cert. denied*, 475 U.S. 1098 (1986). *See also United States v. Webster*, 669 F.2d 185, 186 (4th Cir.)("[T]he proper question should have been whether the affairs of the enterprise were conducted through a pattern of racketeering activity, not whether they were benefitted or advanced or whether profit to the [enterprise] resulted."), *cert. denied*, 456 U.S. 935 (1982); *United States v. Altomare*, 625 F.2d 5, 7 n.7 (4th Cir. 1980)("[C]ourts have almost uniformly refused to adopt the narrow reading of 'enterprise' that would have that word connoting legitimate, private, commercial entities.").

Third, section 1962(c) says nothing about investing or acquiring an interest in an enterprise. Rather, it makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . . " 18 U.S.C. § 1962(c). To the extent that section 1962(a) contemplates enterprises in which investments can be made, it is because section 1962(a) prohibits the investment of racketeering-generated funds in an enterprise, not because of the statutory definition of enterprise. Similarly, if section 1962(b) contemplates enterprises from which an interest can be acquired, it is because that section prohibits the acquisition through racketeering of an interest in an enterprise. Any limitation on the type of enterprises that are covered by those sections derives not from the meaning of the term "enterprise," but from the elements of the crimes specific to those sections, i.e., investing racketeer money in, or acquiring through racketeering an interest in, an enterprise. That section 1962(c) has no such limitation demonstrates that the enterprise covered there need not be one that can absorb an investment or yield an interest. Rather, a section 1962(c) enterprise need only be one whose affairs can be conducted through racketeering activity.[31]

B. The Legislative History of RICO Reveals that Congress Did Not Intend an Economic Motivation Requirement

Nothing in the language or structure of RICO discloses an intention by Congress to limit the act's reach to enterprises or

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[31] Several months after its decision in *Ivic*, another Second Circuit panel, implicitly recognizing the weakness of the *Ivic* court's "structural analysis," eschewed the conclusion that the enterprise must be one with an economic motivation, referring to the discussion in *Ivic* as *dictum*. *United States v. Bagaric*, 706 F.2d at 56-57 (affirming RICO conviction of Croation terrorists). It held that § 1962(c) applies to enterprises that are not economically motivated, so long as the predicate acts have a "financial purpose," but cited no language in the statute that embraces that limitation. *Id.* Separated from any moorings in the language of the statute, the doctrine was eroded even further when the Court of Appeals held that the financial purpose of the enterprise or predicate acts need not even be "significant." *United States v. Ferguson*, 758 F.2d at 853 (affirming RICO conviction of members of Black Liberation Army).

predicate acts with a financial purpose. This Court's inquiry should begin and end there: RICO requires no economic motive. Moreover, in the absence of a " 'clearly expressed legislative intent to the contrary', " *United States v. Turkette*, 452 U.S. at 580 (citation omitted), the language of the statute is conclusive. In fact, the presumption that the plain meaning of a statute expresses legislative intent will be rebutted only in "rare and exceptional circumstances." *Ardestani v. INS*, ____ U.S. ____, ____, 112 S.Ct. 515, 520 (1991). The legislative history of RICO, far from evincing a legislative intent contrary to the plain reading of the statute, is consistent with the conclusion that no economic motivation requirement was intended.

First, no basis for the "economic motivation" requirement can be found in the statute's purposes set forth in the statement of findings that prefaces the Organized Crime Control Act of 1970 (OCCA), 84 Stat. 922-23, of which RICO was one of twelve titles.[32] That preface illuminates Congress's concern when it enacted OCCA that organized crime and the money and power it acquired drained the country's economy and increasingly were used to corrupt the democratic process. To be sure, "[t]he occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. at 248. Thus, if it were true that Congress did not expressly contemplate that the statute would be invoked against enterprises such as defendants', that would not mean that the statute were being misconstrued or is ambiguous. " '[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.' " *Sedima*, 473 U.S. at 499 quoting *Haroco Inc. v. American*

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[32] Both the *Ivic* court and the court below stated that they discerned the economic motivation limitation in the purposes Congress sought to advance. *See National Organization for Women v. Scheidler*, 968 F.2d at 628 ("[W]e believe congressional concerns may not have extended so far as the activities of political terrorists which involve neither economic crimes nor economic motivations."); *United States v. Ivic*, 700 F.2d at 61 ("Further light upon the meaning of § 1962(c) is cast by the statement of findings that prefaces the Organized Crime Control Act of 1970").

National Bank & Trust Co. of Chicago, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985).

Just as the use of RICO "against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is [not] a sufficient reason for assuming that the provision is being misconstrued," *id.*, the use of section 1964(c) against defendants' enterprise is no occasion to impose an amorphous "economic motivation" requirement on the statute. If plaintiffs' ability to use RICO to seek civil redress for defendants' politically motivated criminal acts is a defect, "it is one 'inherent in the statute as written' ", *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. at 249 quoting *Sedima*, 473 U.S. at 499, and is for Congress to correct should it see fit.

Second, on two occasions, Congress considered and rejected versions of bills leading to RICO that would have limited the act's reach to economically motivated enterprises. "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. at 23-24. One predecessor bill would have made a it a felony to acquire with income derived from criminal activity "any beneficial interest in any of the assets, liabilities or capital of any business enterprise" engaged in interstate commerce. S. 1623, 91st Cong., 1st Sess., § 2 (1969). In enacting RICO, and in particular, section 1962(c), Congress determined to use the broad term "enterprise" rather than "business enterprise." *See also* 18 U.S.C. § 1961(4)(defining "enterprise").

After hearings on a number of predecessor bills, the Senate Judiciary Committee added a subsection (e) to section 1962,[33] which stated: "A violation of this section [1962] shall be deemed to continue so long as the person who committed the violation continues to receive any benefit from the violation." The bill that ultimately passed both houses did not include that language, demonstrating Congress's intent not to include an economic

[33] *See* S.30, 91st Cong., 1st Sess., § 1962(e)(1969), reprinted in S. Rep. No. 617, 91st Cong., 1st Sess. 1-2 at 23.

motivation requirement in the statute. *See* Note, *supra* at n. 8, at 1359-60.[34]

The debates surrounding the passage of OCCA reveal Congress's intent to enact a statute of broad reach. For example, as this Court recounted in *H.J. Inc. v. Northwestern Bell Telephone Co.*, when opponents criticized OCCA because it failed to limit the statute's reach to organized crime, "the sponsors made evident that the omission of this limit was not an accident but a reflection of OCCA's intended breadth." *Id.* 492 U.S. at 246. Senator McClellan, a leading proponent of OCCA, rejected the argument that, because it was the danger posed by organized crime which moved Congress to examine the criminal justice system, it should "follow . . . that any proposals for action from that examination be limited to organized crime[.]" 116 Cong. Rec. 18913 (1970).

Senator McClellan expressly rejected criticism of the statute's intended reach beyond organized crime:

> S. 30 is objectionable on civil liberties grounds, the [Civil Liberties Union] and city bar committee suggest, because its provisions have an incidental reach beyond organized crime. Coming from the Civil Liberties Union in particular, this objection is indeed strange. Has the union forgotten that the Constitution applies to those engaged in organized crime just as it applies to those engaged in white collar or street crime? S. 30 must, I suggest, stand or fall on the constitutional questions without regard to the degree to which it is limited to organized crime cases. If the bill violates the civil liberties of those who are engaged in organized crime, it is objectionable as such. But if it does not violate the civil liberties of those who are engaged in organized crime, it

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[34] Congress further evinced its intent not to make economic motivation an element of a RICO claim in providing coverage over all entities where a pattern of racketeering activity might be found. *See* 116 Cong. Rec. 592 (List of Entities in Which Organized Crime Has Been Active, including charities, foundations, governmental agencies and other non-profit entities); *id.* at 601, 606 (comments of sponsors on corruption of public officials). That intent is evident in RICO's definition of "enterprise," which includes "any . . . group of individuals associated in fact." 18 U.S.C. § 1961(4).

> does not violate the civil liberties of those who are not engaged in organized crime, but who nonetheless are within the incidental reach of provisions primarily intended to affect organized crime.

Id. at 18914. *See also id.* at 18491 ("It is self-defeating to attempt to exclude from any list of offenses such as that found in Title IX all offenses which commonly are committed by persons not involved in organized crime.") In fact, when Senator Kennedy observed that OCCA could apply to noneconomically motivated actors, such as Dr. Benjamin Spock, who was convicted of conspiring to violate the Selective Service Act, Senator McClellan agreed, and did not object: "I do not know why anyone should not count violations of the Civil Rights Act, the draft laws, or anything else that is a felony."[38]

Representative Poff, a principal House sponsor, echoed Senator McClellan's understanding, stating:

> It is true that there is no organized crime definition in many parts of the bill. This is, in part, because it is probably impossible precisely and definitively to define organized crime. But if it were possible, I ask my friend, would he not be the first to object that in criminal law we establish procedures which would be applicable only to a certain type of defendant?

Id. at 35204.

The legislative history does not demonstrate a congressional intent to impose an economic motivation requirement in conflict with the plain text. "[I]ndeed, the legislative history shows that Congress knew what it was doing when it adopted commodious language capable of extending beyond organized crime." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. at 246. Congress enacted RICO in the face of criticism — and with the intent — that it would apply beyond organized crime to politically motivated extremists.

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[38] 116 Cong. Rec. 845-46. *See also* Note, *supra* n. 8, at 1360-64 (recounting sponsors' responses to criticism that RICO reaches noneconomically motivated actors).

C. The Economic Motivation Requirement Will Embroil Courts and Juries in Controversy Irrelevant to RICO's Purposes

In rejecting the argument that a private civil RICO action can be brought only to redress a distinct "racketeering injury," this Court expressed its discomfort with the "vagueness of that concept." *Sedima*, 473 U.S. at 494. Pointing out that the opinion of the *Sedima* Court of Appeals "gave scant indication of what racketeering injury means" and that the difficulty of defining that term "itself cautions against imposing such a requirement," this Court concluded that "[t]here is no room in the statutory language for an additional, amorphous 'racketeering injury' requirement." *Id.*

Economic "purpose" or "motivation" are similarly amorphous requirements. Untethered to any textual definition, and unencumbered by any explanation of its possible meaning in the legislative history of RICO, the "economic motivation" requirement can only sow confusion in the courts rather than promote clarity and predictable applications of the statute. That confusion is already evident in the development of the doctrine in the Second and Eighth Circuits.

As we discussed above, the Second Circuit first identified the economic purpose requirement in *United States v. Ivic*. That case involved the conviction of Croation partisans of independence who used "terror, assassination, bombings, and violence in order to foster and promote their beliefs and in order to eradicate and injure persons whom they perceived as in opposition to their beliefs." 700 F.2d at 58. The Court of Appeals reversed the conviction because the indictment did not charge that the enterprise or predicate acts had any "financial purpose." The court located the financial purpose requirement in, among other places, the structure of section 1962 and in the congressional concern that organized crime was infiltrating legitimate businesses which animated the enactment of RICO. *Id.* at 60-63. The Court of Appeals explained that for a civil RICO action to lie the individual defendants must be seeking "personal gain," *id.* at 61; their conduct must have a "mercenary motive," *id.* at 59; the predicate acts must have a "financial purpose," *id.*; and the enterprise must be "the sort of entity one joins to make money." *Id.* at 60.

The Second Circuit quickly discarded those requirements in *United States v. Bagaric*, however. That case, like *Ivic*, involved the conviction under RICO of Croation independence partisans. The evidence at trial in *Bagaric* included proof that the defendants had used murder and threats of violence to extort money from other Croations and used that money to fund the enterprise's political activities. The *Bagaric* court characterized as *dictum* the *Ivic* court's argument that the structure of section 1962 indicates a congressional intent that the enterprise be profit-seeking, *id.* 706 F.2d at 56-57, recognizing that the "situation reached by § 1962 may . . . not always be one in which the enterprise 'makes money' for its members" and that Congress intended to cover non-profit entities "invested in, acquired or maintained through a pattern of racketeering." *Id.* Nevertheless, the court affirmed the RICO convictions, although there was no proof that the enterprise threatened to infiltrate legitimate business, while adhering to the requirement that at least the predicate acts must have a "financial purpose." It did not explain why the defendants in *Bagaric*, any more than those in *Ivic*, represented a threat of organized crime infiltration into legitimate businesses.

The Second Circuit continued to erode the *Ivic* standard in *United States v. Ferguson*, in which members of the Black Liberation Army were convicted under RICO for bank robberies and murders through which they acquired funds for their revolutionary activities. The Court of Appeals rejected the argument that its cases required "that there must be a *significant* economic purpose for RICO to apply." *Id.*, 758 F.2d at 853(emphasis in original). Rather, following the post-*Ivic* decision in *Bagaric*, the *Ferguson* court held that some economic dimension to the enterprise or predicate acts is sufficient for RICO liability. *Id.*

In short, from *Ivic*, where the Second Circuit required that the enterprise or its acts be profit-seeking, it has retreated to the *Bagaric/Ferguson* requirement that the enterprise or predicate acts merely involve an economic aspect. That requirement finds no textual or historical support.

In the Eighth Circuit, the economic motive doctrine is equally confused. With no explanation, that court has most recently stated that "[f]or purposes of RICO, an enterprise must be

directed toward an economic goal." *United States v. Flynn*, 852 F.2d 1045, 1053 (8th Cir. 1988) (citing *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980)[36], *cert. denied*, 450 U.S. 912 (1980) and *United States v. Ivic*, 700 F.2d at 59-65). However, that court has also expressly held that a RICO enterprise is not limited to "units of *economic* organization, whether public or private." *United States v. Clark*, 646 F.2d 1259, 1265 n.11 (8th Cir. 1981)(emphasis in original).

Moreover, in *United States v. Ellison*, 793 F.2d 942 (8th Cir. 1986), the court appeared to eschew an economic motive requirement altogether. That case involved "the founder and leader of a group dedicated to securing the supremacy of white Christians by promoting and engaging in defensive activities such as survivalism and paramilitary training, and in offensive activities intended to cause the downfall of the United States government." *Id.* at 945. The government proved that Ellison's enterprise, the "Covenant, the Sword and the Arm of the Lord," ("CSA"), committed two arsons, including the burning of a church "the congregation of which allegedly consisted of homosexuals." *Id.* The court of appeals, in affirming Ellison's conviction, stated:

> Although the two arsons that the government relied on to establish a pattern of racketeering activity had no direct financial benefit to CSA or Ellison, the evidence showed that these predicate acts did bolster CSA members' morale and commitment to CSA, and in the instance of the burning of the church . . ., furthered CSA's intentions to punish nonconforming groups.

Id. at 950. The court found that the "two arsons constituted a 'pattern' because they stemmed from the same or similar purposes, involved the same group of participants, and had similar methods of commission," *id.*, and held that Ellison had conducted CSA's affairs through a pattern of racketeering activities. Thus, notwithstanding its most recent statement in *Flynn*, it is not at

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[36] The *Scheidler* court recognized that the "economic goal" discussion in *Anderson* was *dictum*. 968 F.2d at 627 ("[E]conomic motive was not an issue in . . . *Anderson*. . . . The lack of significant focus on motive weakens the authority of [*Anderson*] somewhat on this particular issue . . . .")

all apparent that the Eighth Circuit has in the past imposed an "economic motivation" requirement.

In addition to leading to confusing and unpredictable results in the application of RICO, the "economic motivation" requirement invites courts and juries to consider irrelevant matters in determining whether an enterprise has engaged in unlawful racketeering activity. The *Bagaric* court itself noted that it was "troubled by the notion . . . that the Government will be required to prove the animating or long-run objective of a RICO enterprise was economic, apparently to the exclusion of other, collateral 'motives.' " 706 F.2d at 53 n.11. It noted that defense counsel had "sought to inject peripheral political and religious considerations into the trial of this case, implying that appellants' anti-Communism or Catholicism, or their persecution by American and Yugoslavian officials acting in concert, justifiably drove them to commit the acts of extortion and violence charged in the indictment." *Id.* at 54. It feared that the requirement of determining whether non-economic purposes predominate "would authorize the admission of political beliefs, racial animosity, and family and blood feuds as justification for criminal acts" in contradiction with "the traditions of our criminal law [which] contemplate trials free of consideration of such issues. . . ." *Id.* at 55.

Those fears are well-founded. Although the *Bagaric* court expressed its intention that such considerations not enter into RICO prosecutions, courts and juries faced with an obligation to assess whether an enterprise or its racketeering acts have a "financial purpose" surely will inquire about the significance of competing motives, such as religious, political or psychological objectives, and seek to weigh whether financial or other concerns predominated in the commission of crimes. Those inquiries are by and large foreign to criminal prosecutions and civil actions, for they inflame passions and defeat the fair administration of justice. Indeed, motive, while sometimes relevant evidence, is not generally an element of a crime. *United States v. Pomponio*, 429 U.S. 10, 12-13 (1976); *United States v. Washington*, 705 F.2d 489, 493 (D.C.Cir. 1983); *United States v. Howard*, 504 F.2d 1281, 1284 (8th Cir. 1974).

This Court has previously stated that "[a] violation of § 1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a

pattern (4) of racketeering activity. The plaintiff must, of course, allege each of these elements to state a claim. . . . But the statute requires no more than this." *Sedima*, 473 U.S. at 496-97. There can be no dispute that petitioners alleged each element of a § 1962(c) claim set forth by the *Sedima* Court. The requirement of economic motivation or purpose which the court below read into RICO invites consideration of questions irrelevant to the traditional concerns of the law. Because it is not plainly required by the text or history of the statute and serves no policy relevant to RICO, economic motivation should not be required in a civil or criminal RICO prosecution.

III. RICO CAN BE APPLIED TO POLITICALLY MOTIVATED RACKETEERING ENTERPRISES CONSISTENTLY WITH THE PRINCIPLES OF THE FIRST AMENDMENT

Although it is not a question that the Court has certified for review, *amici* anticipate that respondents will argue that a civil suit alleging a violation of section 1962(c) cannot proceed without trammelling precious First Amendment rights.[37] *Amici* are steadfast in their view that the rights of speech and association, which are so fundamental to our constitutional democracy, must not be infringed. We are confident, however, that an action under RICO against those who advocate violence to obtain governmental restrictions on the right to privacy can proceed consistently with the important values enshrined in the First Amendment.

There can be no question that meetings, speeches, petitions, nonviolent picketing and boycotts are forms of speech and conduct that are entitled to protection under the First Amendment. "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process" and citizens must be able to make their views known by collective effort, lest their voices "be faint or lost." *Citizens Against Rent Control Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294 (1981). Such speech may cajole others to boycott businesses without losing its protected

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[37] *See, e.g.*, Brief of Respondents Joseph M. Scheidler, et al. In Opposition to the Petition for Certiorari, at 23-28. *See also* Califa, *RICO Threatens Civil Liberties*, 43 Vand. L. Rev. 805 (1990).

character. *Thornhill v. Alabama*, 310 U.S. 88 (1940). Indeed, "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." *National Association For the Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982)("*Claiborne*"); *see also Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). Moreover, the right to associate does not lose constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected. *Claiborne*, 458 U.S. at 908.

But while the use of speech, marches and threats of social ostracism cannot provide the basis of a damages award or judgment in equity, "violent conduct is beyond the pale of constitutional protection." *Id.* at 933. "[V]iolence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of advocacy." *Samuels v. Mackell*, 401 U.S. 66, 71 (1971)(Douglas, J., concurring). No federal rule of law prevents a court from imposing liability for losses that are caused by violence and threats of violence. *Claiborne*, 458 U.S. at 916.

So, too, are there limitations on speech when it impermissibly crosses a line encroaching on important realms of privacy. Of course, even speech that is intended to be "offensive" is entitled to the protection of the First Amendment. *Texas v. Johnson*, 491 U.S. 397, 407-10 (1989). Generally, the burden for avoiding unwelcome speech in a public forum is on the listener, not the speaker. *E.g. Cohen v. California*, 403 U.S. 15, 21 (1971). But, the First Amendment accords no right to trespass on private property. *Hudgens v. NLRB*, 424 U.S. 507 (1976). Similarly, restrictions on speech that causes emotional turmoil to medical patients, jeopardizing their safety and impairing their recovery, are also permitted by the First Amendment. *NLRB v. Baptist Hospital*, 442 U.S. 773, 784-86 (1979).

The possibility that damages may be assessed or injunctions entered against antiabortion protesters who have engaged in a pattern of racketeering activity does not threaten their protected rights of speech or association even though they may also advocate lawful means of protest. *Amici* recognize that when unlawful

conduct occurs in the context of constitutionally protected activity, " 'precision of regulation' is demanded." *Claiborne*, 458 U.S. at 916 quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963). *But see Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941)(Pervasive violence may justify injunction against violent and nonviolent protest activity as an "utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force."). Nothing in this action or in the nature of civil or criminal RICO runs athwart the principle that restrictions aimed at unprotected conduct should not unduly infringe protected speech.

This Court's First Amendment jurisprudence provides sufficient guidance so that fundamental associational and speech rights need not be infringed by civil RICO litigation. First, a civil action cannot, and need not, impose sanctions for the consequences of nonviolent, protected activity. Any judgment entered should ensure that "[o]nly those losses proximately caused by unlawful conduct . . . be recovered." *Claiborne*, 458 U.S. at 918. *See also United Mine Workers v. Gibbs*, 383 U.S. 715, 729-30 (1966).

Second, a RICO prosecution will not punish individuals for mere association with those who advocate lawless action. "For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." *Claiborne*, 458 U.S. at 920. The First Amendment imposes a barrier against too broad an application of a conspiracy claim, as well.[38] Only antiabortion protest organizers who have a specific intent that others engage in illegal activity and who counsel others to engage in such activity can be held liable for a RICO conspiracy. Even those who advocate lawless action cannot be held liable unless there is evidence that they authorize, direct or ratify specific lawless activity, or that they have made

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[38] Section 1962(d) of RICO provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962(d).

speeches likely to incite lawless activity which were followed within a reasonable period by such activity. *Id.* at 928; *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).[39] Nothing in plaintiffs' allegations in this case threatens to overstep those limits.

Finally, there is no reason to fear that application of RICO to antiabortion racketeering will chill protected activity. Because a RICO civil action requires allegations that each defendant has engaged in specifically delineated criminal conduct, the possibility that the application of RICO will have a chilling effect is minimal as each defendant will realize before hand that he is violating the law. *See*, Note, *supra* at n. 8, at 1372. Moreover, as respondents themselves recognize, other laws, such as those against harassment, nuisance and tortious interference can provide redress from the type of lawless conduct they are alleged to have undertaken. RICO should chill lawful expressive activity no more than any other legal remedy.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the action should be remanded for trial.

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[39] Such advocacy, however, could be used as evidence that a defendant "gave other specific instructions to carry out violent acts or threats." *Claiborne*, 458 U.S. at 927.